No. 18716

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT ARRAIGA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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I.

JURISDICTIONAL STATEMENT.

On December 12, 1962, the Federal Grand Jury for the Southern District of California, returned an indictment in two counts charging in count one that the appellant, Robert Arraiga and his codefendant, Carlos Manriquez conspired to receive, conceal, transport and facilitate the concealment and transportation of heroin in violation of Title 21 of the United States Code, Section 174. Count two charged that the codefendant Manriquez knowingly and unlawfully received, concealed and facilitated the concealment and transportation of the heroin which was the subject of Count One. [C. T. 2-4.][1]

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[1]C. T. refers to the Clerk's Transcript of Record.

On December 26, 1962, the appellant and his co-defendant were arraigned before the Honorable William M. Byrne and both parties entered pleas of not guilty. The Court then ordered the case transferred to the Honorable Harry C. Westover for all further proceedings. [C. T. 5.] Subsequently, the case was re-transferred to the calendar of the Honorable Leon R. Yankwich, and on February 12, 1963, the Court heard the trial of the matter without a jury. On the same date the Court found the appellant and his codefendant guilty with respect to count one. Manriquez, the only party charged in the second count, was found not guilty as to count two. [C. T. 6.]

On March 11, 1963, both defendants were present with their counsel in the courtroom of Judge Yankwich and, following argument by counsel and statements by Arraiga and Manriquez, both of the defendants were sentenced to the custody of the Attorney General for a period of five years. [C. T. 7.]

A timely Notice of Appeal was filed by the appellant Robert Arraiga on March 20, 1963. [C. T. 9.] The appellant then applied to the District Court for an order permitting an appeal *in forma pauperis* and this petition was acted upon favorably on April 3, 1963. [C. T. 14.]

The jurisdiction of the United States District Court was conferred by Section 2131 of Title 18, United States Code. The jurisdiction of the Court of Appeals to entertain this matter is set forth in Title 28, United States Code, Sections 1291 and 1294.

II.
STATEMENT OF THE FACTS.

At the onset, it is important that the reader of this brief be made aware of a relatively small geographical area in the eastern portion of the City of Los Angeles, California. A reading of the record reveals that the appellant's co-defendant Carlos Manriquez resided at 941 South McBride Street in Los Angeles. [R. T. 3.] This street runs north and south and is bounded on the west by Duncan Street and on the east by McDonnell Street. [R. T. 41, 42.] The record does not reveal, nor are we concerned with, the street which intersects McBride Street to the north of the Manriquez residence. To the south the first intersecting street is Verona Street, the next is Olympic Boulevard and the last is Telegraph Road. [R. T. 43.] The latter thoroughfare parallels a freeway and, as a consequence, the McBride Street—Telegraph Road intersection takes the form of a T. [R. T. 34.]

With the above in mind, we turn to a consideration of the record which reveals that officers of the California and Federal Narcotic Agencies were aware that Carlos Manriquez was engaged in the narcotics traffic. [R. T. 57.] In an effort to develop further information relative to the involvement of Manriquez, the officers determined that they would maintain a surveillance of his home. By pre-arrangement, Dennis Cook and William Stoops, deputy sheriffs assigned to the narcotic detail of the Los Angeles Sheriff's Office, met with Jacques Kiere, an agent of the Federal Bureau of Narcotics. This meeting occurred immediately north of Telegraph Road on McBride Street at approximately 6:45 P.M. on the evening of November 13, 1962. [R. T.

39, 78.] At that time Agent Kiere joined the state officers in their vehicle which was specifically designed for the purposes of surveillance. The vehicle was a panel truck with the panel portion completely enclosed and small holes bored in the paneling so that surveillance could be maintained from the unseen portion of the truck. [R. T. 39, 63.]

At their meeting point Officers Kiere and Stoops took up positions within the panel portion of the truck and Officer Cook assumed the driver's seat. [R. T. 39.] Cook then drove north on McBride Street intending to find a vantage point from which the officers could observe the Manriquez home. The officers circled the 900 block fruitlessly on two occasions and were in the process of passing Manriquez' residence for the third time when they noted the suspect backing from his driveway in a 1953 Chevrolet. [R. T. 14, 29.] Cook passed the residence headed in a northerly direction and observed the defendant Manriquez to back his otherwise unoccupied car onto McBride Street and drive to the south. [R. T. 31.] Officer Cook immediately pulled into an alley, turned around and followed Manriquez southbound on McBride Street. The surveillance was interrupted as the defendant Manriquez' vehicle made the signal at Olympic and McBride and the agent's truck was stopped by a red light. [R. T. 40.] When they again had the right of way Deputy Cook chose to turn left to the adjoining McDonnell Street, inasmuch as there were no other cars on McBride Street and the officer did not want to call attention to his vehicle. After traveling one block on McDonnell Street to Telegraph Road, the government vehicle turned to the right on Telegraph Road and proceeded west. As they passed

the northwest corner of Telegraph Road and McBride Street, Officer Cook noted that the defendant Manriquez was on foot immediately along side of a boulevard stop sign which is approximately two feet from a fire hydrant; both the sign and hydrant were in a grassy area bordering the paved sidewalk. At the moment that the vehicle passed the corner, Officer Cook noticed the defendant Manriquez make a "bending or stooping motion" with his left hand extended in the area between the stop sign and fire hydrant. [R. T. 41.] Cook proceeded west driving at approximately 25 m.p.h. and traveled a short block to Duncan Street; there he made a u-turn and returned east on Telegraph Road. As he proceeded eastbound, Cook observed Manriquez walk onto the wide sidewalk corner in question; this is about ten feet from the stop sign—hydrant area. Cook continued in the eastern flow of traffic for about two more blocks and then made another u-turn and stopped momentarily for a brief conversation with his fellow officers. He then proceeded westbound once more on Telegraph Road. As he approached the northwest corner of McBride and Telegraph, Cook noticed that Manriquez and his 1953 Chevrolet were gone; however, he saw what appeared to be the defendant's car northbound on McBride Street. Cook continued to drive to Duncan Street and there made a right-hand turn. At Olympic Cook again saw the 1953 Chevrolet. [R. T. 42.] The agents' vehicle crossed Olympic and made a right-hand turn onto Verona Street, which is the first street north of Olympic. As Cook's vehicle reached the intersection of Verona and McBride, he noted Manriquez pulling into his driveway. Cook turned right onto McBride and drove south until he reached a point

some 50 feet north of Telegraph. At this time Cook parked the panel truck, exited it and walked to the northwest corner of Telegraph and McBride; there he observed a crumpled Pall Mall package in the grassy area between the stop sign and the hydrant. It was the only debris in view and Cook stopped to retrieve it. The package was found to contain two heroin filled rubber condrums which were turned over to Federal Narcotics Agent Kiere. [R. T. 43.] Approximately 5 to 6 minutes had elapsed between the time the officers had last seen Manriquez on the corner and 7:05 P.M. when the cigarette package was retrieved. [R. T. 44.]

In observing the area in and about the corner where the narcotics were found, the officers noted that there were no street lights on the corner but there was sufficient illumination inasmuch as there was a rather constant flow of traffic on Telegraph and a street light on the opposite side of Telegraph. Additionally, there was considerable light afforded by the traffic on the nearby freeway. [R. T. 34, 38, 75.]

After discovering the contraband, the agents drove their truck to a surveilling position on the west side of McBride Street. The vehicle was parked faced to the south about 100 feet from Telegraph. Three-quarters of an hour passed and no one appeared; as a consequence, Cook started his vehicle and began to drive from the curb. Just as he did this, Cook observed a 1960 or 1961 light blue Thunderbird pull to the curb on the north side of Telegraph Road, some 30 to 40 feet from the corner where the narcotics had been recently discovered. [R. T. 45.] As the government vehicle entered the intersection, Cook saw the appellant

Arraiga alight from the Thunderbird and walk in the direction of the northwest corner of McBride and Telegraph. Officer Cook continued his turn and entered the eastbound lanes of traffic. As soon as possible, the law enforcement vehicle made a u-turn and headed back towards Arraiga. As Cook passed McBride Street he observed Arraiga walk past the stop sign on the corner in question and look to his rear towards the east and then to the north up McBride Street. Again the officer made a u-turn at Duncan Street and returned with the traffic in an eastern direction. As the officers passed the northwest corner this time; Arraiga was observed to be on one knee, apparently feeling in the grass with his hands in an approximate 2 foot wide area immediately between the stop sign and the fire hydrant. [R. T. 46, 48.] The officers' vehicle continued on Telegraph to McDonnell Street and again made a u-turn. As their vehicle headed west once more, it was observed that Arraiga's automobile was gone; as a consequence, the officers' car continued to Duncan Street, made a right hand turn and drove to Olympic Boulevard. As they turned east onto Olympic, Cook saw Arraiga walking across McBride to a gasoline station on the southeast corner of McBride and Olympic. At the time the panel truck passed McBride Street, Cook observed Arraiga's Thunderbird on the west side of McBride and headed to the south. He saw Arraiga enter a telephone booth on the gas station lot. The officers continued on Olympic for a block or so and then turned around and parked on the northern curb of Olympic. At this time field glasses were used to maintain further surveillance. [R. T. 51.] A close observation revealed that Arraiga was no longer in the booth.

Cook then drove to McBride and turned left in the direction of Telegraph Road. As Cook drove down McBride, he observed the Thunderbird to pull to the west curb and Cook immediately brought the government vehicle to the curb. When he had completed parking, Cook looked again to the Thunderbird but did not see anyone. Some 5 minutes later Cook observed Arraiga walk towards his car, enter it and drive away. [R. T. 52.] In attempting to follow Arraiga's car, Cook lost contact and did not discover this for a mile or more. When he realized his error, Cook turned about and returned to McBride and Telegraph. Upon arriving at the intersection Cook observed the blue Thunderbird again; Arraiga was still driving and Manriquez was his passenger. Cook continued to drive past McBride Street to the next block west, at this point Deputy Stoops left the vehicle in order that he might take up a position of surveillance from an area southwest of the McBride Street corner. Cook turned right on Duncan Street and right again on Olympic and McBride so that he could maintain observation of the defendants from a position north of them on McBride Street. Cook's view was somewhat obstructed but he did see both the men leave the car and walk to the corner; there the officer observed Manriquez stop and look in the area between the fire plug and stop sign. Officer Cook then noted that Arraiga was standing in the gutter bordering the grassy area where Manriquez was standing. [R. T. 53.]

In the meantime Stoops had located two truck-trailers parked on Telegraph Road approximately 75 to 100 feet from McBride Street. The officer crawled under the east most truck and thereby gained an unob-

structed view of the corner. From this position Stoops saw Arraiga crossing McBride Street towards the east. Manriquez was observed to be standing near the stop sign on the northwest corner of McBride Street. [R. T. 99.] As Arraiga walked to the east, Manriquez took up a squatting position and move his hands in the area between the hydrant and sign. [R. T. 100.] About a half-minute passed and Manriquez regained the standing position and followed Arraiga. Manriquez joined his companion in front of the Wayside Inn, a bar located in the middle of the block east of McBride. [R. T. 101.] Arraiga then entered the bar and Manriquez remained on the sidewalk in front. Minutes later Arraiga reappeared and joined Manriquez; at this time the two men stood conversing for several minutes. Once again they parted and Manriquez returned to the northwest corner of McBride as Arraiga re-entered the bar. Upon arriving at the corner Manriquez again searched the area around the fire plug.

After another brief search Manriquez returned to the sidewalk outside the bar and was there met by his associate. The two men then returned to the corner. [R. T. 101.] When they arrived, Arraiga walked in the gutter on the west side of McBride Street and looked towards the ground as he approached his parked car. Manriquez again stopped in the area where the officer had recovered the Pall Mall package and viewed the ground as he walked to the side of Arraiga. When both men reached their car they entered it and drove away. [R. T. 102.]

Both parties were apprehended by the officers the following week. The defendants were not together when they were arrested and during the course of a

routine interview after Arraiga's apprehension he was asked by Deputy Cook if he knew Manriquez; Arraiga stated that he did not. [R. T. 137.] Cook then asked if Arraiga knew a man named "Nero" *i.e.,* an alias of Manriquez, and when the appellant did not respond, Cook further identified Manriquez as "[T]he guy that lives at 941 on McBride." Again the officer received a negative answer.

III.

ARGUMENT.

I.

The Evidence Did Establish the Existence of a Criminal Conspiracy.

The subject of criminal conspiracy has been discussed in numerous law articles and cases, consequently, it would only belabor the point to treat conspiracy extensively in this brief. Suffice it to say, that the cases seem to be in accord that:

> "[T]he gist of the offense of conspiracy . . . is an agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy . . ."

United States v. Falcone (1940), 311 U. S. 205, 210, 61 S. Ct. 204, 85 L. Ed. 128. See also *Pettibone v. United States* (1892), 148 U. S. 197, 13 S. Ct. 542, 37 L. Ed. 419 and *Marino v. United States* (9 Cir. 1937), 91 F. 2d 691.

As indicated by the above definition there need be proven only one overt act in furtherance of the con-

spiracy and the commission of this act, albeit by one conspirator, is binding upon the others. *Rose v. United States* (9 Cir. 1945), 149 F. 2d 755 and *Marino v. United States, supra.*

On page twenty-eight of his opening brief the appellant frames his objection to the conviction by stating that the United States failed to prove that he received, concealed, *et cetera* the narcotics upon which the prosecution was premised. Additionally, the appellant contends that the record does not reflect an agreement between Arraiga and Manriquez to violate the narcotic laws.

In answer to the first argument the Government would cite the Court to its recent decision in *Twitchell v. United States* (9 Cir. 1963), 313 F. 2d 425, 429 where the Court in discussing a conspiracy stated:

> ". . . We have in mind the established rules that it is not necessary to show that the substantive offense was actually committed (*Goldman v. United States,* 1918, 245 U.S. 474, 477, 38 S. Ct. 166, 62 L. Ed. 410; *Marino v. United States,* 9 Cir. 1937, 91 F.2d 691, 696, 113 A.L.R. 975) . . ."

In light of this citation it can be seen that it is not incumbent upon the prosecution to prove the substantive crime which is the object of the conspiracy in order to sustain the conspiracy conviction.

As to the second portion of the appellant's argument, this actually centers about the question as to whether there was sufficient evidence to warrant a conviction. Although the following citation is from a civil case in another circuit, it is particularly illuminative of the

framework within which the Court must appraise this contention of the appellant.

> "We need not advert to citation of authority that under the procedure prescribed for the United States Courts, the function of deciding all questions of fact is that of the jury or, in the absence of a jury trial, that of the trial court and that this rule has its reason and foundation not only in the Constitution but also in the fact that those who see and hear witnesses are much better equipped to weigh the evidence and determine the credibility to be extended to those testifying than are the judges of the courts of review who do not enjoy the same advantages . . ."
>
> *Jennings v. Murphy* (7 Cir. 1952), 194 F. 2d 35 at 36.

In implementing the above considerations the test utilized by this Circuit in determining whether sufficient evidence has been proven was recently voiced in *David Farrell, et al. v. United States* (August 7, 1963), No. 18,241 and *Longino Castro v. United States* (August 2, 1963), No 18,396. In the former case at page six the Court stated:

> "The decisions reveal two tests which are applied in determining the sufficiency of either direct or circumstantial evidence to support a jury verdict. The verdict of the jury must be sustained if there is substantial evidence when viewed in the light most favorable to support the judgment. *Glasser v. United States,* 315 U.S. 60 (1942); *Williams v. United States,* 273 F.2d 781 (9th Cir. 1959), C.D. 362 U.S. 951; *Robinson v. United States,* 262 F.2d 645 (9th Cir. 1959); *Miller v.*

United States, 302 F.2d 659 (9th Cir. 1962). The verdict of a jury must be sustained if reasonable minds as triers of the fact, could find that the evidence excludes every reasonable hypothesis but that of guilt. *Remmer v. United States,* 205 F.2d 277 (9th Cir. 1953). See also: *Bolen v. United States,* 303 F. 2d 870 (9th Cir. 1962)."

In viewing the facts which were before the trial Court it should be kept in mind that the actions of Arraiga and Manriquez were apparently uninhibited as they were unaware that the law enforcement officers were maintaining a surveillance of their activities. Those facts indicative of a criminal conspiracy are: (1) On the evening in question, Officer Cook saw the defendant Manriquez making a "bending or stooping motion" with his left hand extended in the area between a stop sign and fire hydrant at the northwest corner of Telegraph Road and McBride Street. No one was with Manriquez. (2) Some five to six minutes later Cook retrieved an apparently empty Pall Mall package from the area between the hydrant and sign. This package contained heroin. (3) Approximately 45 minutes later the appellant pulled to the curb on the west side of Telegraph Road. He was alone and walked immediately to the corner in question. (4) The appellant was then observed to be on one knee in the grassy area between the fire plug and street sign, and appeared to be searching the area with his hands. (5) Arraiga left the area minutes later and by his own admission he thereafter placed a phone call to Manriquez. (6) After completing the call, Arraiga again drove to the northwest corner of McBride and Telegraph and was seen to leave his car in the area. (7) Arraiga termi-

nated this visit some 5 minutes later and was not observed again for about 20 minutes. When seen again the appellant was driving his car and had Manriquez as his passenger. (8) Arraiga parked his car at the McBride corner and was observed to look in the gutter area abutting the ground between the hydrant and sign. At the same time Manriquez was searching the grassy area. (9) Manriquez continued to look as Arraiga entered a nearby bar. (10) A short time later both men again combed the area before leaving. (11) Upon questioning by the arresting officers, Arraiga stated he knew no one by the name of Carlos Manriquez, nor did he know anyone nicknamed "Nero", *i.e.,* an alias of Manriquez. Arraiga further stated that he did not know anyone residing at 941 South McBride Street. At trial the appellant stated he had been to the home of Carlos Manriquez on several occasions and knew him by that name and by the alias of "Nero". (12) The appellant stated at trial that he had parked on McBride and walked via the northwest corner of McBride and Telegraph to the Wayside Inn on Telegraph Road. The testimony of the agent revealed that the appellant parked on Telegraph near the bar, yet he walked immediately to the corner where the narcotics had been cached. (13) Finally, there is the ludicrous story of the appellant that the only reason he was in the area was in order that he might meet a girl whom Manriquez knew and in the course of his activities the appellant lost his watch crystal in the approximate area where the officers discovered the heroin.

It is the position of the appellee that in view of the above evidence there was considerable material upon which the trial Court, utilizing the tests voiced in the *Farrell* case, could find the appellant guilty.

II.

The Trial Court Was Not in Error in Its Understanding of the Degree of Proof Required to Convict the Appellant of Criminal Conspiracy.

It should be kept in mind that:

> ". . . there has been a long and consistent recognition that the commission of the substantive offense, and a conspiracy to commit it are separate and distinct offenses . . . A conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy . . ." [citations omitted]. *Blumenthal v. United States,* (9th Cir. 1947), 158 F. 2d 883, 887, affirmed 332 U. S. 539, 68 S. Ct. 248, 92 L. Ed. 154; sustained 331 U. S. 799, 67 S. Ct. 1306, 91 L. Ed. 1824; sustained 332 U. S. 856, 68 S. Ct. 385, 92 L. Ed. 425.

Recognizing this progression of offenses, if you will, and applying this concept to the instant case it can be seen that it may well take a different quantum of proof to carry the crime out of the conspiracy stage and into the actual substantive offense. This is all the trial Court meant when it said:

> "As to the evidence, I take it as axiomatic that it takes less to prove a conspiracy than it takes to prove a substantive offense." [R. T. 152.]
>
> . . .
>
> "That does not follow because it takes less to convict a man of conspiracy than of a substantive offense." [R. T. 161.]

We are essentially engaged in a question of semantics and lest there be any doubt as to the degree of proof

or the standard of proof applied by the trial judge, we would refer this Court to the statement of Judge Yankwich when he acquitted the Defendant Manriquez of substantive crime charged in count two.

> "I will tell you what I will do on Count Two I believe there is a *reasonable doubt* which exists, and I will find him not guilty as charged in Count Two of the Indictment." [R. T. 153.] Emphasis added.

From this statement it is obvious that the Court utilized the concept of reasonable doubt in determining criminal liability.

III.

The Entitlement of the Indictment Is Not Controlling.

A review of the indictment under which the appellant was convicted reveals that the entitlement charges a violation of the general conspiracy statute as set forth in Title 18, United States Code, Section 371. [C. T. 2.] However, the body of the first count charges a conspiracy to violate "21 United States Code, Section 174." Furthermore, the phrasing of this count utilizes the wording of the code in proscribing a conspiracy to traffic in narcotics in violation of Title 21, United States Code, Section 174. Though such an oversight on the part of the Government is not to be condoned, it certainly cannot be said that the appellant was prejudiced in his defense of this case, nor was the trial Court misled as witnessed by the following statements:

> "I want to call the attention of the United States Attorney to the fact that they continue in these cases to put in the wrong section, and while, of

course, the section is not binding on the court, the fact remains that conspiracy as to narcotics is not governed by . . .

. . .

"Section 371, which is the regular conspiracy section. It is governed by Section 174. Somebody may make a mistake because there is a great difference.

"Section 371 is the general conspiracy statute and the penalty is not more than five years.

"Section 174, Title 21, is a special section applicable to narcotics, and the penalty is a minimum of five years.

"So we are dealing with entirely different sections. It is one of the few instances where a conspiracy is separately Section 174, Title 21, says, 'Whoever fraudulently', and so forth, 'conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty', punished.

"The other one applies to general conspiracy.

"I have called the attention of the deputies here dozens of times—they just use the old form and probably, because some day some judge will not look at the section, he will sentence a man and impose an illegal sentence under the conspiracy statute." [R. T. 156, 157.]

In support of its position in this matter the United States looks to the case of *Stillman v. United States* (9th Cir. 1949), 177 F. 2d 607, 611 where this Court stated:

". . . The cases make it clear that the caption is not a controlling factor and that erroneous

recitals therein do not vitiate an indictment; furthermore, that a distinction must be drawn between the body (the charging part) and its caption." [Citations omitted.]

See also:

Williams v. United States (1897), 168 U. S. 382, 389, 18 S. Ct. 92, 42 L. Ed. 509.

IV.

Conclusion.

On the facts in this record and the law applicable thereto, for the reasons stated herein, the judgment entered against appellant Robert Arraiga is free from error and should be affirmed.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

William D. Keller